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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 14 2005
LIN 03 195 25878

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

In response to the director's request for additional evidence, prior counsel asserts that the petitioner is an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a medical degree from Harbin Medical University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, medical research, and that the proposed benefits of his work, improved treatment of hepatitis C, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The director concluded that the petitioner's unique experience could be articulated on an application for labor certification and that the petitioner's publication and citation record did not suggest a track record justifying projections of future benefit. On appeal, counsel asserts that *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 215 "is somewhat vague and difficult to apply" but that it allows a waiver of the labor certification process where the process is inapplicable. In addition, counsel asserts that the petitioner's current employer is unable to seek a labor certification in behalf of the petitioner because of its own internal rules. Counsel further asserts that the director misinterpreted the frequent attestations of the petitioner's "unique" skills as arguing for a waiver based on a shortage of qualified workers instead of affirming his status as irreplaceable.

First, we do not agree with counsel's characterization of *Matter of New York State Dep't. of Transp.* While the decision acknowledges that there are situations where the labor certification process is not applicable, it finds that "the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field." *Id.* at 218, n. 5. The decision then states that "it clearly must be established that the alien's past record justifies projections of future benefit to the national interest." *Id.* at 219. Thus, the director used the correct standard; the employer's decision not to utilize the labor certification process does not obligate Citizenship and Immigration Services (CIS) to grant a waiver of that process to its employees.

Counsel asserts that *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221-222, in its discussion of "unique skills," was articulating the proposition that a shortage of a certain type of engineer is not a persuasive argument for waiving the labor certification process in the national interest. That decision provides:

> It cannot suffice to state that the alien possesses useful skills, or a "unique background." As noted above, regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process.
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> * * *
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> Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for a labor certification. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold.
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> * * *
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> The Service also does not dispute the advantage to the petitioner of retaining qualified staff rather than training inexperienced, newly hired workers. . . . Because exceptional ability, by itself, does not justify a waiver of the job offer/labor certification requirement, arguments hinging on the degree of experience required for the profession, while relevant, are not dispositive to the matter at hand.

Id. Thus, *Matter of New York State Dep't. of Transp.*, goes beyond stating that a shortage of a particular type of engineer is insufficient. Rather, as stated by the director, it rejects any contention that unique skills or knowledge warrant a waiver of the labor certification process in the national interest. This position would not, as implied by counsel, belittle Dr [redacted] uniqueness as the discoverer of the theory of relativity. The theory of relativity is not remarkable because it was unique, but because of the easily demonstrated impact it has had on nearly every area of physics. Counsel's remaining arguments regarding the evidence of the petitioner's specific accomplishments in the field will be discussed below.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *See generally id.* at 223. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

At the time of filing, June 2003, the petitioner had been working as a research assistant in the laboratory of Dr. [redacted] at the University of Iowa since 2001. It is claimed that the petitioner's work at this university is sufficient to establish his eligibility.

Dr. Schmidt asserts that the petitioner's most important achievement is "the creation of the unique cell system for studying the hepatitis C virus [(HCV)]." Dr. [redacted] further asserts that, unlike the only other cell system for HCV, the petitioner's cell system can express powerful enzymes in addition to HCV proteins. Dr. [redacted] explains that this cell system "allows researchers to study the pathological mechanism of HCV proteins and the chemicals that metabolite by p450 enzymes." These enzymes, which increase with the ingestion of alcohol, acetaminophen, and a drug used to treat tuberculosis, are related to liver damage. According to Dr. [redacted] the petitioner's cell system "provides the first effective tool to combat this critical problem." The petitioner subsequently used his cell system to discover that HCV proteins increase oxidative stress, filling "an important hole in the HCV research area."

Dr. [redacted] an associate professor at the Mount Sinai School of Medicine, explains that the petitioner used recombinant DNA techniques to introduce DNA versions of viral genes into living cells in culture and then used resistance markers to select cells expressing the viral genes at high levels. The resulting cell model system can be used to determine the impact proteins have on cell function and physiology. Dr. [redacted] indicates that her group "is very interested in [the petitioner's] cell system because these cells have the potential to express both the conventional core protein and the new protein that was discovered in my laboratory." The record contains a January 29, 2003 letter from Dr. [redacted] Dr. [redacted] expressing an interest in a "continuing collaboration" to determine the effects of alternative reading frame proteins on oxidative stress.

Dr. [redacted] Medical Director of the Liver Transplant Program at the California Pacific Medical Center, asserts that successful completion of the petitioner's current research could lead to antioxidants as a new generation of therapy for HCV patients. Dr. [redacted] a research fellow at the National Cancer Institute, National Institutes of Health, and Dr [redacted] a professor at the University of Nebraska, provide similar information. Several of the references note that the petitioner's work is government funded and assert that the petitioner, as the developer of the cell system, is the only individual with sufficient familiarity with the system to assist with future research.

Beyond the petitioner's cell system, Dr [redacted] asserts that the petitioner has also influenced clinical treatment of HCV patients nationwide. Specifically, Dr. [redacted] explains that 40 percent of patients with HCV also have cryoglobulinemia, which contributes to increased liver disease. The petitioner "found that cryoglobulinemia HCV patients with more advanced liver disease than those without cryoglobulinemia responded more favorably to antiviral therapy." Dr. [redacted] describing this finding as "groundbreaking," asserts that it is being implemented in clinics nationally. Several references provide similar information, including Dr. [redacted] who asserts that the "majority" of doctors have changed their management strategy for HCV patients with cryoglobulinemia. The record, however, does not contain a press release or letter from the American Medical Association (AMA), or similar entity, recommending new treatment strategies based on the petitioner's work, or even letters from practicing physicians nationwide affirming that they have changed their treatment of HCV patients based on the petitioner's findings.

The petitioner also submitted two grant applications, both listing a principal investigator, two co-investigators, and the petitioner as a research associate. Dr. [redacted] one of the co-investigators on both grants, asserts that government grants are sometimes limited to investigators who are U.S. citizens or lawful permanent residents.

In response to the director's request for additional evidence, the petitioner submitted a new letter from Dr. [redacted] reiterating his previous assertions and discussing the petitioner's more recent work. The petitioner also

submitted letters from other researchers in the field. These letters have been read and considered. As they reiterate assertions already discussed above, however, we need not repeat such information in our decision.

At the time of filing, the petitioner had published three abstracts and presented his work at conferences. In response to the director's request for additional evidence, which did not request evidence of accomplishments after the date of filing, the petitioner submitted evidence of additional conference presentations, a newly published abstract, and an article published in the *Journal of Medical Virology.* In his final decision, the director found the petitioner's publication and citation record to be minimal and rejected evidence relating to the petitioner's accomplishments after the date of filing, citing *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

On appeal, counsel asserts that the director wrongly compared the petitioner's publication record to researchers with many more years of experience. Counsel further asserts that the instant petition does not involve a labor certification, is based on future contributions and, thus, the adjudication should consider post-filing publications. Counsel notes that scientific discovery is a lengthy process that culminates in publication. Counsel asserts that publication after the date of filing is "proof that the qualification (i.e. benefit to the national interest) existed at the time the case was filed."

Counsel is not persuasive. First, we reject counsel's implication that the peer-review process results in the publication of only influential innovations in the field. As stated by the director, publication is expected of researchers, including students. While we would not expect the petitioner to demonstrate the same number of publications as those who have been in the field longer than he has, it remains that three abstracts, conference presentations, and no citation history is not consistent with a researcher with a track record of success with some degree of influence on the field.

Further, we concur with the director that the petitioner must demonstrate eligibility as of the date of filing. A request for additional evidence does not imply that evidence relating to accomplishments after the date of filing will be accepted. *See* 8 C.F.R. § 103.2(b)(12). We find that *Matter of Katigbak,* 14 I&N Dec. at 49 is applicable to non-labor certification cases. Whether or not the priority date is established by the filing of the labor certification or the petition itself, the reasoning behind requiring eligibility as of the date of filing is to prevent aliens from acquiring a priority date prior to being eligible for the benefit sought. *See also Matter of Great Wall,* 16 I&N Dec. 142, 145 (Act. Reg. Comm. 1977). *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 219, is consistent with this position, as it clearly focuses on the petitioner's past history of achievement.

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. It can be argued, however, that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

At best, the instant petition was filed prematurely, prior to publication of the petitioner's most interesting work such that it could prove influential on the field as a whole. At the time of filing, and even on appeal, the record lacks evidence establishing that the petitioner has already influenced the field to any significant degree. It is acknowledged that the petitioner has developed a new cell system. While innovation of a new method is of greater importance than mere training in that method, such innovation is not always sufficient to meet the

national interest threshold. *Id.* at 221, n. 7. The record lacks evidence that the petitioner has patented the cell system. Even if he had, the petitioner would need to demonstrate that there is a wide interest in licensing the system. *Id.* Alternatively, the record also lacks evidence that the petitioner's work with this cell system has been widely cited or otherwise widely adopted. A single request to collaborate with the petitioner's mentor is insufficient. Further, as stated above, the record lacks recommendations from the AMA or physician testimonials confirming that the petitioner has influenced treatment strategies for HCV patients "nationwide" as claimed.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.